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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 SCOTT JOHNSON,

17 Plaintiff,

18 v.

19 NEIL B. GOODHUE, Trustee of the
Sandringham Trust UTD August 4, 1999;
20 DIANE C. GOODHUE, Trustee of the
Sandringham Trust UTD August 4, 1999;
21 EDWARD MAURICE PLANT III, Trustee
of the Woodbury Drive Revocable Trust of
22 1999 dated March 4, 1999;
STARBUCKS CORPORATION, a
23 Washington Corporation; and DOES 1-10,

24 Defendants.
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No. 4:16-cv-00724-DMR

**DEFENDANT STARBUCKS
CORPORATION'S REPLY IN
SUPPORT OF MOTION FOR RELIEF
FROM JUDGMENT AND TO REOPEN
DISCOVERY**

Complaint filed: February 12, 2016

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I. INTRODUCTION

Starbucks brought this motion to amend this Court's Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment based on newly discovered evidence that establishes facts critical to whether Plaintiff has standing to bring the claims he alleges in his complaint: 1) Plaintiff sent agents into a businesses on his behalf in the past, and has continued to do so as recently as July 2018; 2) Plaintiff visited dozens of other businesses in the Danville area on the dates he claims he visited or conducted a drive-by at the Starbucks at issue in this case; and 3) Plaintiff has maintained intake forms detailing his visits to the Starbucks at issue in this case, but refused to produce them or disclose their existence in a privilege log.

Plaintiff's Opposition largely chooses to ignore these facts and instead selectively reimagines the parties' September 10, 2018 evidentiary hearing conducted by the Honorable Joseph Alsup in *Johnson v. Centercal, LLC et al* 3:17-CV-02454-WHA ("September 10 Hearing") in a manner that is both disingenuous and directly at odds with Judge Alsup's orders following the hearing. The Court should not be swayed by Plaintiff's relentless obfuscation and should grant the instant motion.

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II. ARGUMENT

A. Plaintiff's Past Patronage Of A Business And His Intent To Return Are Elements Of Standing In Title III ADA Cases; Plaintiff's Document Production, Corroborated By The Testimony Of His Employees Support Starbucks' Challenge to Plaintiff's Standing In This Case

"Mr. Johnson has standing to seek the fix", states Plaintiff's Motion for Summary Judgment. "Starbucks is conveniently located. Once the violations are removed, Mr. Johnson will return and continue to patronize the Starbucks often." [Motion p. 14, ln 4-15] This was the *entire basis* for Plaintiff's claim of standing when this Court considered Plaintiff's motion for summary judgment. But, at the time briefing on the motion concluded neither Starbucks nor this Court knew about Plaintiff's general business practices, the existence of contemporary intake forms, or the number of businesses he visited on the same dates he claims to have visited the Starbucks at issue in this case. Consequently, Starbucks had no basis to dispute Plaintiff's standing. This Court's Order granting Plaintiff's summary judgment motion in part reflects the

1 absence of this dispute. [October 17, 2018 Order Granting in Part and Denying in Part Plaintiff's
2 Motion for Summary Judgment, ECF Dkt. No. 129 p. 10, ln 20-22]

3 Plaintiff argues that his motivation for visiting the Starbucks at issue in this case is
4 irrelevant, and that so long as he proclaims himself to be vindicating his rights under the ADA,
5 he has standing to bring suit against any public accommodation if he has knowledge of
6 perceived ADA barriers and so much as *contemplates* visiting the business. [Opposition p. 13, ln
7 8—14, ln. 2] However, Plaintiff's citation to *Civil Rights Education and Enforcement Center v.*
8 *Hospitality Properties Trust* (9th Cir. 2017) 867 F.3d 1093, 1102 for that proposition is does not
9 withstand scrutiny. [Opposition p. 13, ln 8-21] The suggestion that Plaintiff is a "tester," was
10 never raised prior to this motion. In addition, while *Civil Rights Education and Enforcement*
11 *Center v. Hospitality Properties Trust* does state that "tester" status does not *deprive* a litigant of
12 standing, it does not, by itself, *confer* standing. A person bringing suit under Title III of the ADA
13 for injunctive relief must still demonstrate "an invasion of a legally protected interest which is
14 (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.*
15 at 1098. This is particularly true when, as here, Plaintiff is a serial litigator of Title III ADA
16 cases. These cases warrant a complete and thorough examination of Plaintiff's standing.
17 "[G]iven the trend of abusive ADA litigation, special diligence and vigilant examination of the
18 standing requirement are necessary and appropriate to ensure the litigation serves the purposes
19 for which the ADA was enacted." *Vogel v. Sym Properties, LLC* (C.D. Cal., Aug. 4, 2017, No.
20 CV 15-09855-AB (ASX)) 2017 WL 4586348, at *2 quoting *Harris v. Stonecrest Care Auto*
21 *Center, LLC* (S.D. Cal. 2007) 472 F.Supp.2d 1208, 1215. Thus, to establish standing in a Title
22 III ADA case—even where Plaintiff claims to be a "tester"—Plaintiff must show that he suffered
23 "[A]n injury in fact—an invasion of a legally protected interest which is (a) concrete and
24 particularized, and (b) actual or imminent, not conjectural or hypothetical." *Harris v. Stonecrest*
25 *Care Auto Center, supra* at 1215.

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1 **1. Standing In Title III ADA Cases Demands An Analysis Of**
2 **Plaintiff's Past Patronage Of The Business At Issue And His**
3 **Intent To Return; Plaintiff's Summary Judgment Motion And**
4 **Opposition Ignore This Requirement**

5 An analysis of a Plaintiff's past patronage of a business and the likelihood of his
6 professed intent to return is an essential component of the Title III ADA standing analysis.
7 "Both actual injury, which includes deterrence and causation in its definition, and imminent
8 injury, which includes a threat of future harm, require, at the very least, that a plaintiff be likely
9 to return to patronize the accommodation in question." *Id.* at 1216 [Emphasis added]. "In
10 determining whether a plaintiff's likelihood of returning to a particular establishment is
11 sufficient to confer standing [under the ADA], courts have examined factors such as: (1) the
12 proximity of the place of public accommodation to plaintiff's residence, (2) plaintiff's past
13 patronage of defendant's business, (3) the definiteness of plaintiff's plans to return, and (4) the
14 plaintiff's frequency of travel near the accommodation in question." *Barrilleaux v. Mendocino*
15 *County* (N.D. Cal., July 26, 2018, No. 14-CV-01373-DMR) 2018 WL 3585133, at *27 quoting
16 *Harris v. Stonecrest Care Auto Center, LLC* (S.D. Cal. 2007) 472 F.Supp.2d 1208, 1216. In
17 addition, "[A]s the distance between the plaintiff's residence and the public accommodation
18 increases, the likelihood of future harm decreases. When the distance between the two is
19 significant, especially if it is in excess of 100 miles, courts have consistently held that it weighs
20 against finding a reasonable likelihood of future harm." *Molski v. Mandarin Touch Restaurant*
21 (C.D. Cal. 2005) 385 F.Supp.2d 1042, 1045.¹ Plaintiff's Opposition does not—and cannot—
22 refute the fact that the evidence Starbucks discovered after Plaintiff's Motion for Summary
23 Judgment was fully briefed raises significant questions about Plaintiff's past patronage of the
24 Starbucks at issue in this case and his intent to return.

25 **2. The Testimony Of Plaintiff's Former Employees, And The**
26 **Disclosures Made In Compliance With The September 11 And**
27 **24 Orders Provided New Facts That Call Plaintiff's Standing**
28 **Into Question And Directly Contradict Plaintiff's Own**
 Testimony

 In addition to skirting the issues material to this motion, Plaintiff's selective recounting
of the testimony and the Court's comments at the Parties' September 10 Hearing wholly ignores

¹ The Starbucks location at issue in this case is approximately 98 miles from Plaintiff's home in Carmichael, CA.

1 the outcome, chiefly that: (1) Judge Alsup ordered the production to Starbucks of intake forms
2 reflecting visits to Starbucks, and lists of businesses Plaintiff visited on the dates at issue in that
3 case; and (2) The order was intended to resolve questions about Plaintiff's standing. [September
4 11 Order, *Johnson v. Centercal, LLC et al* 3:17-CV-02454-WHA, ECF Dkt No. 71 ("September
5 11 Order"), p. 2, ln 10-20] As much as Plaintiff wishes otherwise, the testimony of Plaintiff's
6 former employees was sufficient to raise questions about Plaintiff's standing and overall
7 credibility, and the testimony of Plaintiff's current employee, Julie Ann Leilani Milo did nothing
8 to answer those questions.²

9 **3. The Testimony Of Plaintiff's Former Employees Addresses**
10 **Plaintiff's Practice Of Sending Agents Into Starbucks; This**
11 **Testimony Is Directly Relevant To Plaintiff's Past Patronage**
12 **Of This Starbucks And His Intent To Return**

13 Plaintiff's selective excerpting of September 10 Hearing cannot obscure the fact that all
14 of Plaintiff's former employees testified that Plaintiff would send them into businesses on his
15 behalf to make a purchase and collect a receipt. [Opposition p. 5, ln 18-19, p. 7, ln 2-7, p. 10, ln
16 5-7] Although, the testimony specifically refers to events that predate this case, it is still relevant
17 in that, as noted by Judge Alsup's September 24 Order after the Court's *in camera* review
18 ("September 24 Order"), [*Johnson v. Centercal, LLC et al*, ECF Dkt No. 77], Plaintiff has
19 persisted in this practice as recently as July 2018. This testimony is also probative of the
20 credibility of Plaintiff's receipts and photographs, which are put forth as evidence of his visits to
21 the Starbucks location, but do not actually establish his physical presence therein.³ Try as
22 Plaintiff might, he cannot obscure the fact that these revelations call into question his past
23 patronage of this Starbucks and were discovered only after Plaintiff's summary judgment motion
24 was fully briefed.

25 ² For example, Plaintiff's Opposition contends that Plaintiff's business practices were exonerated by the testimony
26 of his current employee Julie Ann Leilani Milo. Not so. Ms. Milo may have testified that Plaintiff does all visits
27 himself and that she has no doubt about it. [Opposition p. 11, ln 9-16] However, Judge Alsup's order after *in*
28 *camera* review makes it clear that this particular testimony lacks credibility. In ordering the production of additional
intake forms memorializing visits on December 16, 2016, March 8, 2016 and July 18, 2018 Judge Alsup noted
"These three intake forms tend to indicate that someone other than plaintiff purchased an item and obtained a receipt
in connection with plaintiff's visits to Starbucks store." [September 24 Order, p. 1, ln 20-27]

³ Plaintiff's receipts and photographs establish that *someone* went into the Starbucks at issue in this case, but do not
carry any indicia that Plaintiff himself did so.

1 (a) **The Court's September 24 Order And Plaintiff's**
2 **Production In Response Establish That Plaintiff's**
3 **Practice Of Sending Agents Into Starbucks Is Ongoing**

4 Plaintiff's Opposition presents the testimony of Plaintiff's former employees as
5 irrelevant because it concerns Plaintiff's practices from some time ago and have no bearing on
6 the time period at issue in this case. [Opposition p. 5, ln. 5-7] This is irreconcilable with
7 Plaintiff's production in response to the September 24 Order. Plaintiff's production of
8 documents in compliance with the Court's September 24 Order makes clear that Plaintiff sent
9 agents into Starbucks locations as recently as July 18, 2018. This production also demonstrates
10 that Plaintiff sent agents into Starbucks locations in 2016, which suggests that this practice was
11 ongoing during or near the period at issue in this case. In addition to raising questions about
12 whether Plaintiff actually ever personally visited the Starbucks at issue in this case, these
13 disclosures raise questions about whether or not Plaintiff intends to return to this Starbucks.

14 (b) **i. Plaintiff's Lists Of Visits To Businesses Raise**
15 **Significant Questions About His Past Patronage Of The**
16 **Starbucks And Directly Contradict His Testimony**
17 **Relating To His Travel To The Danville Area**

18 Plaintiff's list of businesses he visited in the Danville area on dates he claims to have
19 visited the subject Starbucks in this case includes as many as 81 other businesses he "visited"
20 and excludes the businesses he merely drove by. Plaintiff explains his refusal to disclose his
21 "drive-bys" at the Starbucks at issue in this case by claiming that he was not required to disclose
22 his "drive-by" visits because they do not, for lack of better term, "count." [Opposition p. 2, ln
23 10—p. 4, ln 22] Plaintiff's novel tabulation of his "visits" and "drive-bys" to dozens of
24 businesses furthers the notion that Plaintiff's proffered reasons for his travel to Danville are
25 plainly not credible.

26 Plaintiff testified in deposition that his visits to the Starbucks at issue in this case are
27 incidental to his visits to the Blackhawk Museum, to look for real estate in the area, and to enjoy
28 the scenery. He does not have any family or close friends in the area.

29 25 Q. Do you have any family in this area?

30 1 A. No.

31 2 Q. Do you have any close friends in the area?

32 3 A. No.

[Deposition of Scott Johnson, p. 119, ln 25—p. 120, ln 5]

Q. Okay. You were -- there's nine days between
17 those two visits, March 13 and March 22. ... it just seems odd that you would travel
19 from your home to Danville, California, so close together
20 and you have no recollection of why you were in the area.

21 Were you out looking for locations to sue?

22 A. No. There is a Blackhawk auto museum in Danville
23 that I go to.

24 Q. How frequently do you go?

25 A. During this time frame, I went quite frequently

[Deposition of Scott Johnson, p. 120, ln 16-25]

18 Q. Other than the Blackhawk Museum, what else do you
19 visit in the Danville/San Ramon area?

20A. At that point in time, I was looking for real

21 estate in that -- that area.

[Deposition of Scott Johnson, p. 122, ln 18-21]

Q. What else do you do in the Danville/San Ramon
3 area?

4 A. Basically, just shop and take in the -- the
5 bistros and -- you know, it's a nice area, Danville and
6 Alamo and Walnut Creek.

7 Q. So you're a tourist?

8 A. Yes. I like to get out of Sacramento.

[Deposition of Scott Johnson, p. 123, ln 2-8]

Plaintiff's disclosures, made after this motion was fully briefed—tell quite a different
story. By Plaintiff's own tabulations these disclosures show that he was in Danville to *visit* as
many as 81 businesses in a day and *drive by* an untold number of others all for purposes of his
ADA litigation. Given these numbers, it is not speculative to consider the probability that
Plaintiff's trips to the Danville area consist of nothing more than Plaintiff driving around in his
van, compiling lists of businesses to sue and claiming "deterrence" when he cruises through a
parking lot without stopping. The discord between Plaintiff's testimony, coupled with his
dissembling explanation as to his purported compliance with Judge Alsup's September 11 Order,
raises an inference that Plaintiff's proffered reasons for his past patronage of the Starbucks at
issue in this case are a sham. Specifically, these facts raise an inference that Plaintiff's patronage
of this Starbucks is not incidental to a legitimate sightseeing trip to Danville, but are instead part
of Plaintiff's commercialized ADA litigation wherein he has no genuine purpose for visiting
this—or any—Starbucks location *other than* to sue it for purported ADA violations and has no
interest in returning to this location if there are no ADA barriers that can supply the basis for a

lawsuit.

4. The Newly Discovered Facts Also Raise Issues Concerning Plaintiff's Standing and Damages under Unruh

(a) The New Facts Call Into Question Whether Plaintiff Was In Fact Victimized By A Discriminatory Act

In addition to raising triable issues concerning Plaintiff's standing under Unruh. California courts interpreting the Unruh Act have "[C]onsistently held that an individual plaintiff has standing to bring claims thereunder only if he or she has been the victim of the defendant's discriminatory act." *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 419. The California Supreme Court has noted that plaintiff cannot sue under Unruh for "[D]iscrimination in the abstract, but must actually suffer the discriminatory conduct." *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 165. Plaintiff's "proof" that he was in fact victimized by Starbucks discriminatory acts are receipts and photographs that carry no indicia that it is Plaintiff himself in the Starbucks location at issue. Viewed in the context of the newfound evidence, chiefly that Plaintiff has sent agents into Starbucks stores on his behalf to collect receipts, these receipts and photos look nothing like "proof" of Plaintiff's encounter with the alleged barriers and fail to demonstrate that Plaintiff actually encountered the alleged barriers. Accordingly, there is a triable issue of fact as to Plaintiff's standing under Unruh.

(b) The New Facts Raise Issues Concerning Plaintiff's Entitlement to Statutory Damages Under Unruh

Similarly, the new facts in this case call into question Plaintiff's entitlement to statutory damages. Primarily because if Plaintiff did not encounter the alleged barrier, he is not entitled to statutory damages. *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1410. However, Plaintiff's practice of visiting as many as 81 businesses in a day while driving around Danville on the dates he claims to have visited the Starbucks at issue in this case call into question the reasonableness of his conduct, which is a component of a damages calculation under Unruh by the plain language of the statute. "In an action alleging multiple claims for the same construction-related accessibility violation on different particular occasions, the court shall consider the reasonableness of the plaintiff's conduct in light of the plaintiff's obligation, if any, to mitigate

1 damages.” Civ. Code, § 55.56(i). Plaintiff’s produced lists of businesses he visited on the dates
2 he visited the Starbucks at issue in this case permit a more thorough evaluation of Plaintiff’s
3 reasonableness on this issue.

4 **B. The Intake Forms Are Business Records And Not Covered By Any**
5 **Privilege; They Were Never Shown To Have Been Communicated To**
6 **Counsel And Contain No Legal Analysis Whatsoever**

7 Plaintiff offers a partial recitation of FRCP 26(b)(3)(A) to support a conclusion that
8 Plaintiff’s intake forms are not discoverable by virtue of privilege. [Opposition p. 2, ln 4-8]
9 Plaintiff failed to include these materials in a privilege log when providing disclosures and
10 responding to discovery. Nonetheless, Plaintiff’s underlying assumption is entirely incorrect;
11 Plaintiff’s intake forms are not covered by any privilege. In addition, to the extent any privilege
12 ever existed it has been waived by Plaintiff’s failure to produce a privilege log.

13 **1. Plaintiff’s Intake Forms Are Not Privileged**

14 **(a) Plaintiff’s Notes Are Not Covered By Attorney Client**
15 **Privilege**

16 The attorney-client privilege applies to communications *between lawyers and their*
17 *clients* when the lawyers act in a counseling and planning role, as well as when lawyers
18 represent their clients in litigation. *U.S. v. Chen* (9th Cir. 1996) 99 F.3d 1495, 1501. Plaintiff
19 admitted that his notes were not communications to his attorney:

20 3 Q. You've never shared those notes with your -- your
21 4 attorney; correct?

22 5 A. Not the physical note itself. I've shared the
23 6 information from the notes, but not the physical note
24 7 itself.

[Deposition of Scott Johnson, p. 13, ln 3-7]

25 **(b) Plaintiff’s Notes Are Not Covered By Work-Product**
26 **Doctrine**

27 Similarly, there is no basis for Plaintiff shield his notes from discovery under the attorney
28 work-product doctrine. The work-product doctrine is a qualified protection for a limited class of
materials that reveal an attorney’s strategy, intended lines of argument, and internal
deliberations. Fed.R.Civ.P. 26(b)(3), *Hickman v. Taylor* 329 U.S. 495, 511. However, Rule
26(b)(3)(A)(ii) specifically excludes from the work-product doctrine materials when a party

1 demonstrates a “substantial need for the materials to prepare its case and cannot, without undue
2 hardship, obtain their substantial equivalent by other means.” “A substantial need for work
3 product materials exists where the information sought is “essential” to the party's defense, is
4 “crucial” to the determination of whether the defendant could be held liable for the acts alleged,
5 or carries great probative value on contested issues.” *National Congress for Puerto Rican Rights*
6 *v. City of New York* (S.D.N.Y. 2000) 194 F.R.D. 105, 110. Assuming, *arguendo*, that the notes
7 are attorney work product, Plaintiff’s notes fall squarely into this exclusion. The intake forms
8 may provide evidence of Plaintiff’s visits to the Starbucks, his contemporary impressions of the
9 perceived barriers, whether he went into the Starbucks as he claimed and/or the deterrent effect
10 any barriers that allegedly existed therein. These facts cannot be obtained by any other means
11 and are highly probative of necessary elements of Plaintiff’s claims against Starbucks and his
12 standing to bring these claims. On this basis alone, Plaintiff’s assertion of the work product
13 doctrine is easily overcome—a fact that Judge Alsup noted in ordering the production of the
14 intake forms. [September 11 Order p. 1, ln 26—p. 2, ln 2, “[P]laintiff must turn over all intake
15 forms... * * *To the extent such materials contain privileged work product, this order finds that
16 the materials are otherwise discoverable under FRCP 26(b)(1) and that defendant has shown that
17 it has substantial need for the materials to prepare its case and cannot, without undue hardship,
18 obtain their substantial equivalent by other means.”]

19 **(c) Plaintiff’s Records Are Mere Business Records**

20 Plaintiff’s notes do not fall under the work product doctrine because they were prepared
21 in the normal course of Plaintiff’s business, rather than in anticipation of litigation. Though
22 Plaintiff may be a member of the California bar, his business is not the practice of law. Rather,
23 he is a professional plaintiff whose job is to accumulate perceived ADA violations and transmit
24 the claims to his counsel when he deems it in his interests to do so. [Opposition p. 1, ln. 1-3] His
25 business—warehousing ADA violations—generates these intake forms *whether or not a lawsuit*
26 *is anticipated*. Plaintiff’s own testimony acknowledges as much:

27 18 Q. Is it your custom and practice to make notes
28 19 following a visit to a business that you believe has
20 accessibility violations?
21 A. Well, obviously not all businesses that have

22 violations, but some locations, yes.
[Deposition of Scott Johnson, p. 7, ln 18-22]

A document “generated in the normal course of business even if no litigation was anticipated” is not covered by the work product doctrine. *U.S. v. ChevronTexaco Corp.* (N.D. Cal. 2002) 241 F.Supp.2d 1065, 1082. Plaintiff’s notes were not made in anticipation of litigation, they contain no legal reasoning or analysis and just catalogue his visit to the Starbucks at issue in this case, whether or not he intended to bring an action based on that visit. Plaintiff cannot shield these materials from discovery.

2. Any Privilege That May Have Existed Has Been Waived

In addition, to the extent that any privilege *could* have existed, Plaintiff has waived the privilege by failing to maintain a privilege log. *Apple Inc. v. Samsung Electronics Co., Ltd.* (N.D. Cal. 2015) 306 F.R.D. 234, 237.

III. CONCLUSION

Based on the foregoing, Defendant Starbucks Corporation respectfully moves this Court to set aside its October 17, 2018 Order granting in part and denying in part Plaintiff’s motion for summary judgment, to order the production of Plaintiffs’ intake forms relating to the Starbucks location at issue in this case, to order the production of a list of other businesses he visited or drove by on the dates he allegedly visited this Starbucks, and to permit further briefing and argument on Plaintiff’s motion for summary judgment.

DATED: December 7, 2018

BURNHAM BROWN

/s/ Cathy L. Arias

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STARBUCKS CORPORATION

4845-1531-6354, v. 1